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No. 83-1747

In The
Supreme Court of the United States
October Term, 1983

ARTHUR R. TATE, JR.,
Superintendent Chillicothe Correctional Institute,
Petitioner,

vs.

CHARLES E. ROSE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State court's conviction involving conflicting statements of the accused, and used in the State's case in chief, decided prior to *Edwards v. Arizona,* 451 U.S. 477 (1981), but not yet final on the date *Edwards* was decided, and thus falling under the rules governing retroactivity as set forth in *United States v. Johnson,* 457 U.S. 537 (1982), can be upheld and a Federal habeas corpus which has been granted can be vacated, in light of the treatment of *Edwards* by the decision in *Solem v. Stumes,* — U.S. —, 104 S.Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984).

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, reported as *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983) (A-1). The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported (A-15). The decision of the Ohio Court of Appeals for the First Judicial District is unreported. (A-29).

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. Section 1254 (1). The decision of the United States Court of Appeals for the Sixth Circuit was entered on November 28, 1983. The Court denied a motion for rehearing and rehearing en banc, and this decision was entered on January 26, 1984.

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previousy ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section I of Amendment XIV to the Constitution of the United States:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Charles E. Rose, was indicted by the Warren County, Ohio, Grand Jury on one (1) count of aggravated murder in violation of Ohio Revised Code Section 2903.01 (A). A jury trial was had, and respondent was found guilty of murder, a lesser included offense. Respondent was sentenced on May 30, 1979 to a term of 15 years to life, where he has been incarcerated since at the correctional institution at Chillicothe, Ohio, conducting himself as a model prisoner.

Respondent appealed the decision to the First District Court of Appeals for Warren County, Ohio, and his first assignment of error contended that the inconsistent statements were entered contrary to *Miranda v. Arizona,* 384 U.S. 436 (1966). The appellate court reaffirmed the decision of the trial court in allowing the inconsistent statements into evidence.

Respondent thereafter sought discretionary review with the Supreme Court of Ohio. The motion for leave

to appeal was overruled on March 18, 1981. *Edwards v. Arizona,* 451 U.S. 477 (1981), was decided while respondent's case was still open to file a petition for a writ of certiorari.

Respondent then filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio, Eastern Division. The District Court granted the petition, finding that the rule enunciated in *Edwards v. Arizona, supra,* was violated when Chief Hamilton, on his own initiative, and less than 2 hours after the first interrogation, reinterrogated respondent after respondent had already requested an attorney. At the time of this second interrogation, respondent was having severe stomach problems which later necessitated hospitalization. The District Court held that the *Miranda* rights of respondent were violated by stating

> ". . . the Court concludes that petitioner's right to counsel under *Miranda* was violated since he invoked his right to have counsel present during questioning, and shortly thereafter questioning was resumed without counsel present. . . . Moreover, it is clear that the police did not 'scrupulously honor' his request for an attorney." (A-24)

The District Court did examine the *Edwards v. Arizona, supra,* decision and felt that it was not new law. However, the Court also examined prior law and found that, under *Miranda* and its progeny, that a heavy burden rests on the government to show that a defendant knowingly and intelligently waived his right to counsel. The District Court felt that respondent's rights were not "scrupulously honored" due to the State re-interrogating respondent while he was obviously sick and less than two hours after he had already requested an attorney.

The District Court then found that the error was not harmless because the key issue in the case was whether or not the shooting was accidental, and the comments of respondent which were admitted in the State's case in chief which might have decisively influenced the jury.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit. This Court, by opinion dated November 28, 1983, upheld the district court's grant of the writ of habeas corpus, in *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983). The Sixth Circuit based its decision on *United States v. Johnson,* 457 U.S. 537 (1982), wherein the rules of retroactivity set forth in that case were applied to *Edwards v. Arizona, supra. Edwards* was found to be applicable to the case of respondent, under *United States v. Johnson, supra,* because his case was not yet final when *Edwards* was decided. The Sixth Circuit also felt that *Edwards* did not signal a clear break with the past, especially in the jurisdiction of the Sixth Circuit. (A-7). Also, as noted by the Sixth Circuit, *United States v. Johnson, supra,* specifically states:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed, (or a petition for certiorari finally denied, all) before our decision in *Mapp v. Ohio.*" . . . 102 S. Ct. at 2583 n. 8.
>
> (Emphasis added by alteration of quote). (A-9)

On January 26, 1984, the Sixth Circuit denied petitioner's motion for rehearing and rehearing en banc.

On February 10, 1984, the Sixth Circuit denied petitioner's motion to stay the mandate pending certiorari. Petitioner's motion contained substantially the same is-

sues in the petition before this Supreme Court now. The mandate of the Sixth Circuit was issued on February 13, 1984. Petitioner's application for a stay of the mandate, directed to Justice O'Connor, was denied on February 20, 1984.

On February 29, 1984, this Supreme Court decided *Solem v. Stumes,* — U.S. —, 104 S. Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984).

The evidence in respondent's case is conflicting and subject to different interpretations. The facts show that respondent was married to Jewell Rose on July 1, 1977. (T. 448). On the morning of December 2, 1978, Jewell Rose was "mad" or upset with Respondent about something (T. 456) and she packed his clothes and loaded them into his car. This happened several times before and was not unusual. Later, after the spat, the clothes would go back into the house. (T. 452). After his wife loaded his clothing into the car, Respondent left the house and went shopping for a washer and dryer and other gifts. (T. 456-458).

Later that day, at approximately 4:00 p.m. Respondent entered the Western Auto Store in Franklin, Ohio to go shopping (T. 458). He left and later returned and bought a .22 calibre handgun but received almost no instruction on its use. (T. 461). After the purchase, he went to a carry-out which he frequented, and then went home. (T. 464).

Later, Franklin Police officers received a call concerning a shooting incident on 722 Park Avenue, the home of the decedent. (T. 162-166). Jewell Savage, a neighbor, testified that at about 4:00 p.m. on the day of the shooting, she observed Respondent as he staggered, dazed, through the alley which separates their houses, with a gun in his

hand, heading toward the home of neighbor, Sandy Stephens. It was she who immediately called the police. (T. 175).

Officers responding to the scene found the body of Respondent's wife lying in the doorway of the home.

After the shooting, Respondent, still dazed, went to Charles and Sandy Stephens' house and made comments heard by Mr. Stephens, his wife Sandy, and Mrs. Stephens' sisters, Verla Raney and Phyllis Raney. Mr. Stephens testified that he was sleeping before Respondent came to his house, but he awoke and heard Respondent pleading, "Sandy, go check on her. If she's hurt bad, I have a murder rap." Phyllis Raney testified Respondent told her he accidentally shot his wife (T. 416), and she further testified that the police initially left word "accidentally" out of her statement. (T. 417). Respondent was also concerned about his wife and pleaded for someone to check on her. (T. 351). At no time did he try to hide. (T. 351, 352). Verla Raney testified that Respondent said he shot his wife, but also that he may have said "accidentally". She was only 14 at the time. She does remember Respondent pleading with them to go check on Jewell. (T. 350, 351).

Sandy Stephens testified Respondent told her to take the gun but does not recall him asking her to hide it. In fact Sandy turned the gun over to the police (T. 170). Officer Pressler got no indication that Respondent told anyone to hide the gun (T. 171).

Respondent was arrested at the Stephens' home and while still dazed and upset, told Officer Pressler, "I shot

my wife". (T. 166). He then co-operated with the officer in being taken to the police station.

Respondent was later advised of his constitutional rights (T. 168). After stating that he understood these rights Respondent told Officer Pressler that he did not want to discuss the incident with him (T. 168) and that he wanted to have an attorney (T. 172), whereupon he was then removed to the jail (T. 168).

Approximately two hours later, Franklin Police Chief, George Hamilton, who was acquainted with Respondent, had him brought forth and interviewed him again, advising him of his *Miranda* rights concerning the incident (T. 218). Respondent ill and confused (T. 472) told conflicting versions of what had transpired (T. 235). However, Respondent does not even remember what he said (T. 473). He even signed a rights card "Charles R." instead of his full name (T. 373). In fact, during his interview with Chief Hamilton, Respondent asked at least four times whether his wife was really dead (T. 379, 380).

Respondent, according to the testimony of Chief Hamilton, said he would tell the truth if he would be promised permission to go home (T. 366). Yet, prior to this, Respondent already gave conflicting stories (T. 235) to the chief showing his dazed and confused state. The discussion ceased when Chief Hamilton received a call from Respondent's attorney (T. 223). Subsequent to his interview, with Chief Hamilton, Respondent entered the hospital for 15-16 days because of his ill health (T. 473, 474) which he suffered from at the time of police interrogation. Testimony was also adduced that the gun involved had a heavy pull but could be fired in the manner in which

Respondent stated he had handled the gun in his attempts to load and unload it (T. 319, 320).

At trial, in addition to testifying about his wife's packing his clothes into the car, Respondent testified that he loaded the revolver in his car, parked in the driveway, with eight or nine bullets just prior to entering the house (T. 465, 491). He accidentally fired a shot through the floorboard of his car while loading the gun (T. 466). He then took the gun into the house and laid it on a table. He then testified he was trying to unload the gun when his wife entered the room and the gun went off accidentally (T. 468).

The statement of Respondent, given while he was upset and very ill, and in violation of his prior request to have an attorney, contained incriminating (conflicting) statements, and was used in evidence at trial, over objections. Upon consideration of the evidence, including the incriminating statements, the jury found Respondent guilty of murder.

The re-interrogation of respondent took place after Chief Hamilton had known that Respondent was arrested and at the jail for an hour and a half (See T. 217). One-half hour later, Chief Hamilton began to re-interrogate Respondent (T. 218). Chief Hamilton even knew that Respondent had been advised of his rights by other officers of his police force (T. 221). Chief Hamilton testified he did not know what respondent told the other officers (T. 221), and was not told by Officer Pressler that Respondent wanted an attorney, but also did not bother to ask what was said by Respondent to the officers (See T. 221-222).

The District Court (A-28) and the Sixth Circuit (A-11) both agreed that the admission of the evidence was not harmless error.

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ARGUMENT AGAINST GRANTING CERTIORARI

The issue in the instant case was resolved in the case of *United States v. Johnson,* 457 U.S. 537 (1982). A conviction is not final unless:

> ". . . the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed (or a petition for certiorari finally denied, all) before our decision in *Mapp v. Ohio.*" . . . 102 S.Ct. at 2583 n. 8 (Emphasis added; alteration of quotation in original). (A-9).

It is clear that under *United States v. Johnson, supra,* that Respondent's case was not "final" when *Edwards v. Arizona,* 451 U.S. 477 (1981) was decided. Petitioner now urges this Supreme Court to disregard its own decision in the *Johnson* case. The concurring opinion of Justice Powell in *Solem v. Stumes,* — U.S. —, 104 S.Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984), shows that he has urged this Supreme Court to adopt the rule regarding retroactivity that was adopted in *United States v. Johnson, supra.* See 104 S. Ct. at 1347.

This Supreme Court held in *Solem v. Stumes, supra,* that *Edwards* should not ". . . be applied in collateral review of final convictions." 104 S.Ct. at 1345. *Solem v. Stumes, supra,* clearly involved a collateral review of a final 1973 conviction. That is not the situation in Respondent's case.

Respondent respectfully submits that the rule in *Edwards* should be applied as per the rule on retroactivity

already set down in *Johnson*. The case of Respondent involves a sick and dazed man who does not even sign his full name on the *Miranda* rights card, and has statements he made in response to a further interrogation after he had requested counsel used against him at trial. The District Court found that the statements elicited from Respondent were not the result of a knowing, intelligent, and voluntary waiver of his constitiutional rights (A-24). The statements were inconsisted with prior statements of Respondent and were used in the State's case in chief, not as an impeachment tool.

This Supreme Court has shown disapproval in the past of continuing interrogation of a suspect once the assistance of counsel had been requested. See *Michigan v. Mosley,* 423 U.S. 96, 104 n. 10 (1975); *Fare v. Michael C.,* 442 U.S. 707, 719 (1979); *Rhode Island v. Innis,* 446 U.S. 291, 298 (1980). The case of Respondent clearly falls in this area. It had been shown that Respondent's waiver was not knowing, intelligent, or voluntary. We have also seen that the case of *United States v. Johnson, supra,* has settled the retroactivity issue and will clearly make *Edwards v. Arizona, supra,* applicable to this matter.

Since the issue presented in the instant case is already governed by *United States v. Johnson, supra,* as applied to *Edwards v. Arizona, supra,* and is also governed by the principles of waiver outlined in *Miranda v. Arizona,* 384 U.S. 436 (1966) and its progeny, any issue left open by *Solem v. Stumes, supra,* is not applicable to the instant

case, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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